U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 1 2013 Office: NEBRASKA SERVICE CENTER File:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth M'Cormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn in part and affirmed in part. The appeal will be dismissed.

The petitioner is a software development and consulting business. It seeks to employ the beneficiary permanently in the United States as a senior software architect. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which has been approved by the United States Department of Labor (DOL). The director determined that the petitioner had filed multiple petitions and that it had not established that it had the continuing ability to pay the beneficiary and the multiple beneficiaries the proffered wage amounts beginning on the priority date of the current visa petition. The director also determined that the petitioner had failed to establish that the beneficiary met the minimum job experience requirements at the time the ETA Form 9089 was accepted; and therefore, the beneficiary could not be found to be qualified for the position. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated January 20, 2012, the first issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

> accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on December 8, 2010. The proffered wage as stated on the ETA Form 9089 is $75,000.00 per year. The ETA Form 9089 at part H states that the position requires a master's degree in computer science, computer applications or engineering. Alternatively, the employer noted that in lieu of a master's degree, it would accept a bachelor's degree in "electrical/electronics/mathematics" and five years of work experience.[1] The petitioner also indicated that a foreign educational equivalent is acceptable.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to currently employ 130 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary, the beneficiary claims to have been employed by the petitioner since May 23, 2009 as a software architect and developer.

USCIS records show that the petitioner has filed multiple immigrant visa petitions. As such, the petitioner must also establish that it has the ability to pay all of the sponsored beneficiaries from their respective priority dates. The AAO sent a request for evidence requesting information about the multiple filings.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting

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[1] The petitioner stated in section H.8 of the labor certification that it would not accept experience in an alternate occupation. Thus, the beneficiary's experience must be shown to be as a software architect.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The proffered wage is $75,000.00. The record of proceeding contains copies of IRS Form W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary as shown in the table below:

- In 2010, the IRS Form W-2 stated total wages of $55,705.60 (a deficiency of $19,294.40).
- In 2011, the IRS Form W-2 stated total wages of $54,864.41 (a deficiency of $20,135.59).
- In 2012, the IRS Form W-2 stated total wages of $61,755.80 (a deficiency of $13,244.20).

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd,* No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The AAO's Request for Evidence (RFE) dated April 2, 2013 requested that the petitioner provide a copy of its Internal Revenue Service (IRS) tax returns complete with schedules and attachments for 2011 and 2012. The petitioner was allowed 45 days to respond to the RFE. In response to the AAO's RFE, counsel submits a copy of its 2011 income tax return. The petitioner did not provide a copy of its 2012 income tax return nor does the record of proceeding contain a request for automatic extension for filing its 2012 tax return. It is noted, to date, the petitioner has not provided a copy of its income tax return for 2012.

The petitioner's 1120S[3] tax return demonstrates its net income as shown in the table below:

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[3] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2010-2012) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

- In 2010, the Form 1120S stated net income of $547,938.00.
- In 2011, the Form 1120S stated net income of $595,816.00.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax return demonstrates its net current assets as shown in the table below:

- In 2010, the Form 1120S stated net current assets of $5,712,870.00.
- In 2011, the Form 1120S stated net current assets of $6,049,009.00.

Although the net current asset amounts for 2010 and 2011 exceed the proffered wage amount for those years, and demonstrate that the petitioner could more likely than not have paid both the beneficiary's wage and all the other proffered wage amounts; without the petitioner's 2012 income tax returns it cannot be determined whether it has the ability to pay the proffered wage in that year.

The petitioner submitted a list of beneficiaries for whom it filed petitions, indicating that it is more likely than not it could pay the proffered wage to these other workers and to the beneficiary out of the net current assets indicated on the IRS Form 2011 tax return.

The petitioner submitted letters from its president and controller who stated that the petitioner employs more than 100 workers and had gross annual revenues of $21 million during its most recent fiscal year. It is noted that, the regulation at 8 C.F.R. § 204.5(g)(2) permits USCIS to accept a letter from a financial officer as evidence of the petitioner's ability to pay the proffered wage in a case where the petitioner employs 100 or more workers. There is sufficient corroborating financial documentation in the record of the petitioner's financial strength. The AAO accepts the letter from the controller in these circumstances to establish the petitioner's ability to pay the proffered wage to the beneficiary and the other sponsored workers. The AAO withdraws that part of the director's decision finding that the petitioner does not have the ability to pay the proffered wage.

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[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

A second issue in this case is whether the petitioner has established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a master's degree in computer science, computer applications/engineering. Alternatively, the employer noted that in lieu of a master's degree, it would accept a bachelor's degree in "electrical/electronics/mathematics" and five years of work experience.

On the labor certification, the beneficiary claims to qualify for the offered position based on a bachelor's degree in electrical engineering from received in 1998 and five years of work experience. The record contains a copy of the beneficiary's Bachelor of Engineering degree from issued to him on March 22, 1998. The record also contains transcripts from confirming the award of a bachelor's degree to the beneficiary. This evidence is sufficient to establish that the beneficiary possessed the education required on the labor certification as of the priority date.

The petitioner must also establish that the beneficiary possessed the specified five years of progressive work experience as stated on the labor certification. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The regulation states in part:

> … Evidence relating to qualifying experience or training shall be in the form of letter(s) from current and former employer(s) or trainer(s) and shall include the name, address and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered. …

8 C.F.R. § 204.5(g)(1).

The beneficiary set forth his credentials on the labor certification, and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience in the job offered, in addition to his experience with the petitioner,[5] he represented the following:

- That he was employed by as a customer support/service person from January 1, 1998 to September 23, 1998.
- That he was employed by the as a lecturer-Electrical Engineer from November 25, 1998 to December 4, 1999.
- That he was employed by as a senior software engineer from February 13, 2001 to September 4, 2004.
- That he was employed by as project manager from September 8, 2004 to May 22, 2009.

As evidence of the beneficiary's work experience, the petitioner submitted the following statements:

- A letter from a partner at who stated that the company employed the beneficiary as a customer support and service engineer from January 1, 1998 to September 23, 1998. The work period from January 1, 1998 to March 23, 1998, the date the beneficiary received his bachelor's degree, cannot be considered work experience because it was prior to the beneficiary receiving his bachelor's degree, and all experience gained by the beneficiary must be progressively responsible post-bachelor experience. Thus, this experience may not be considered.
- A letter from the principal of who stated that the beneficiary was employed as a full-time lecturer in electrical engineering from November 25, 1998 to December 4, 1999. The declarant fails to describe the beneficiary's job duties. Thus, this experience may not be considered.
- Affidavits from assistant professors at who stated that the beneficiary worked with them in the electrical engineering department from November 25, 1998 to December 4, 1999, and that the beneficiary was responsible for giving lectures and assisting students during

[5] As the petitioner noted in response to question J.21 of the ETA Form 9089 that the beneficiary did not gain any of his qualifying experience with the petitioner in a substantially comparable position, and because the ETA Form 9089 requires work experience only in the job offered, his experience with the petitioner will not be considered.

laboratory sessions. The affidavits submitted by the beneficiary's co-workers were not written by the beneficiary's supervisors, superiors or human resources representatives; and therefore, cannot be used as evidence of the beneficiary's past employment. Regardless, even if the AAO were to consider the information contained in the affidavits, the declarants fail to specify the number of hours the beneficiary worked on each project and the specific skills used to complete his assignments. *See* 8 C.F.R. § 204.5(g)(1). Further, their descriptions of the beneficiary's duties do not indicate that this experience was gained as a software architect. Thus, this experience will not be considered.

- A letter from the vice president of who stated that the company employed the beneficiary from February 13, 2001 to September 4, 2004, and at the time of his resignation, the beneficiary was working as a senior software engineer. Here, the declarant fails to specify the beneficiary's job title and duties prior to the time he began as a senior software engineer. In addition, he fails to specify what the beneficiary's job duties were as a senior software engineer and how long he maintained that title. As such, the AAO cannot determine how long the beneficiary worked as a senior software engineer.

- The petitioner submitted a letter from which indicated that the beneficiary was employed by the company as a software architect and technical leader from September 8, 2004 to May 22, 2009, and that he was promoted to the position of project manager. The declarant indicated that he was the head of operations and had personal knowledge of the beneficiary's work product during his employment with the company. The declarant described the beneficiary's job duties. This letter does not contain the name or signature of the writer as required by the regulations. Further, the record does not sufficiently indicate the separate nature of this corporation from that of the petitioner. Therefore, it cannot be used to establish the beneficiary's job experience.

As noted above, the evidence from may not be considered, as this evidence was obtained prior to the beneficiary's graduation; the representative from fails to specify what the beneficiary's job duties were as a senior software engineer and how long he maintained that title.

On appeal, counsel asserts that the documentation submitted by the petitioner is sufficient to establish that the beneficiary had gained the required five years of professional experience prior to the priority date of December 8, 2010. Counsel further asserts that the petitioner submitted detailed affidavits from co-workers of the beneficiary who specified his experience and identified the technologies he used at the engineering college. Counsel asserts that regulations permit, in the absence of detailed experience letters, secondary documentation that would establish that the beneficiary has the requisite experience, and infers that the affidavits should be considered as such. However, counsel did not indicate why primary evidence was unavailable from the university, as required by the regulation at 8 C.F.R § 103.2 (b)(2)(i) and (ii). Counsel

also asserts that the employment letter written by should be considered separate from the beneficiary's employment with the petitioner. Contrary to counsel's claim, there is insufficient evidence in the record to demonstrate that the Indian company is not the same employer as the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, while the employment letter from Real Soft (India) specifies the beneficiary's dates of employment and his job duties, it does not comply with 8 C.F.R. § 204.5(l)(3)(ii)(A), in that it does not contain the declarant's name or signature. Therefore, this letter is insufficient to establish the beneficiary's qualifications or work experience.

Accordingly, the petitioner has not been established that the beneficiary has the requisite five years of progressive post-baccalaureate experience in the job offered or that he is qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.